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NOTES.

PROPERTY IN A SPECIAL FRANCHISE AND RATE REGULATION.—A special franchise may be defined as a governmental grant to an individual, of a special privilege, of a public character, not belonging to the people generally as of common right.[1] That the grant conferring this privilege is in the nature of a contract which the State may enforce[2] but may not impair,[3] is well settled. While it is frequently asserted that the right granted is an incorporeal hereditament and therefore property,[4] the statement throws but little light on its real nature. That it is at least a unique form of property is quite apparent; for, strictly, it has no inheritable quality,[5] and

[1]People etc. *v.* Tax Com. (1903) 174 N. Y. 417. See California *v.* Pac. R. R. Co. (1887) 127 U. S. 1, 40; People *v.* Utica Ins. Co. (N. Y. 1818) 15 John. 358; Bank of Augusta *v.* Earle (1839) 13 Pet. 519, 595.

[2]Brownell *v.* Old Colony R. R. (1895) 164 Mass. 29.

[3]Thomp., Corps. § 5335; The King *v.* Pasmore (1789) 3 T. R. 199, 246; State *v.* Real Estate Bank (1845) 5 Ark. 595, 598; City of B. *v.* N. Y. & N. H. R. R. Co. (1869) 36 Conn. 255, 264; Wilmington R. R. *v.* Reid (1871) 13 Wall. 264; People *v.* O'Brien (1888) 111 N. Y. 1, 53; Monongahela Nav. Co. *v.* U. S. (1893) 148 U. S. 312; L. I. etc. Co. *v.* Brooklyn (1806) 160 U. S. 685.

[4]Noyes, Intercorp. Rels. (2nd Ed.) § 134; Reeves, Real Prop. 142; West River Bridge Co. *v.* Dix (1848) 6 How. 507, 534.

[5]3 Kent Com. 459.

may as properly be considered personalty[6] as realty. Nor, in the absence of statutory authority, can it be leased, mortgaged, or sold;[7] and a statute authorizing these transactions operates, according to the better reasoning, merely to invest the franchise holder with the power to appoint another to enjoy a like privilege.[8] Finally, as against the State, except where otherwise provided in the grant, it lacks the element of exclusiveness[9] which is the essence of the conception of property.

The problem of determining the nature of a franchise has usually come before the courts in connection with franchise tax laws, condemnation proceedings, and rate statutes. A franchise is undoubtedly a valuable asset, and as taxation proceeds on the basis of benefits enjoyed,[10] is properly taxed, but not necessarily as property.[11] In New York where the statute makes franchises taxable as real property, the courts have held the tax to be in reality one simply upon a privilege.[12] In condemnation proceedings it is repeatedly asserted that a franchise is property and cannot be taken without compensation.[13] Concededly, however, by the grant of competing franchises,[9] it may be deprived of all value, and it does not clearly follow that because compensation is usually made for a franchise in such proceedings, that payment is being made for it *per se* as property. When a franchise is taken, the State, in a certain sense, deprives the holder of substantial property; it diminishes the value of the plant by an amount equal to the difference between its value in a going business protected by the franchise, and its bare market value as so much machinery, etc. Similarly, where the whole business is taken over, whatever value the franchise has, should be paid for on a proper appraisement of the business, operating in the public service, as a going concern.[14] But in neither of these cases, it is submitted, is payment being made for the franchise as property *per se*. In substance, the compensation is for the dimunition in the value of the real capital caused by the taking of the franchise. This theory finds indirect support in the fact that in many of the cases, where the business has been properly appraised as a going concern, nothing has been added for the franchise, while, where the franchise was added, going concern value seems to have been disregarded.[15]

Even if it be assumed, however, that a franchise must be valued as property *per se* in condemnation proceedings, other considerations are involved in rate regulation. Regulation is the modern substitute for competition in the field of public service where competition would be disastrous.

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[6]Lippincott *v.* Allander (1869) 27 Ia. 460; State *v.* Anderson (1895) 90 Wis. 550.

[7]Gue *v.* Tide Water etc. Co. (1860) 24 How. 257; Richardson *et al.* *v.* Sibley (Mass. 1865) 11 Allen 65; Middlesex R. R. *v.* B. & C. R. R. (1874) 115 Mass. 347.

[8]See Morawetz, Corp. (2nd Ed.) §§ 926, 927.

[9]Charles River Bridge *v.* Warren Bridge (Mass. 1837) 11 Pet. 420; Matter of Union Ferry Co. (1885) 98 N. Y. 139; Syracuse Water Co. *v.* City of Syracuse (1889) 116 N. Y. 167. See, 2 Greenl. Cruise Digt., tit. xxvii, § 29n.

[10]1 Cooley, Taxation (3rd Ed.) 3.

[11]People etc. *v.* Tax Com. *supra*, at p. 440; and see Thomp. Corps., § 5560; 2 Cooley, Taxation (3rd Ed.) 1096; Seligman, Essays in Taxation (3rd Ed.) 186; Provident Inst. *v.* Mass. (1867) 6 Wall. 611; s. c. (Mass. 1866) 12 Allen 312.

[12]People etc. *v.* Tax Com. *supra* at p. 440.

[13]See 8 COLUMBIA LAW REVIEW 218; note 3, *supra*.

[14]See Kennebec Water Dist. *v.* Waterville (1902) 97 Me. 185; Brunswick etc. Water Dist. *v.* Maine Water Co. (1904) 99 Me. 371.

[15]Cf. Gloucester etc. Co. *v.* Gloucester (1901) 179 Mass. 365; Newburyport etc. Co. *v.* Newburyport (1897) 168 Mass. 541; Nat'l. etc. Co. *v.* Kansas City (1894) 62 Fed. 853; Milwaukee etc. Co. *v.* Milwaukee (1898) 87 Fed. 577; Montgomery County *v.* Schuylkill Bridge Co. (1885) 110 Pa. St. 54; Clarion etc. Co. *v.* Clarion County (1896) 172 Pa. St. 243.

If the State may, by creating a competing company,[9] indirectly reduce rates so as to give no return on the franchise, it would seem that it might directly effect the same result where competition is impracticable. It is, submitted, moreover, that a franchise is held *subject* to the right of the State to fix a reasonable rate;[16] to consider any franchise value in calculating rates would be to ignore that condition by a computation based on the assumption that it did not exist. The decision of the Supreme Court in *Willcox et al.* v. *Consolidated Gas Co.*[17] (1909) Supr. Ct., Oct. Term 1908, Nos. 396, 397, 398, is not necessarily in conflict with this view. No general proposition is announced that a franchise should be valued in rate regulation. The allowance of the valuation of $7,781,000 is expressly confined to the special circumstances of the particular case, i. e., the valuation under statutory authority at the amount stated, at the time of consolidation, the issue of stock thereon, and the dealing in that stock by the public relying on the expectation of reasonable dividends. In this light, the case is but a new application of the doctrine of estoppel against the State[18]—an application which may become of considerable future importance in dealing with corporations having watered stock.

Whether in general a franchise should be valued at all, and if so, how, are questions which unfortunately, the Court leaves *in nubibus*. In rejecting the larger value, estimated at the time of suit, placed upon the franchise as property *per se* by the lower court,[19] the Supreme Court declares that finding to have been not only "pure speculation," but "opposed to the principle upon which such valuation should be made." What the true principle is, does not clearly appear. It is said, however, that "the past value [of the franchises] was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas, but that immunity for the future was, of course, uncertain, and the moment it ceased and the legislature reduced the earnings to a reasonable sum, the great value of the franchise would be at once and unfavorably affected." This statement seems to be a recognition of the prevailing method of valuing a franchise on the basis of the earnings of the company. Yet the mere statement discloses the fallacy of this rule. Suppose the appraisal be made before the act takes effect. A company having a capital of $100,000 is earning $12,000 per year. At six per cent., $6,000 represents the reasonable return on its investment. The balance of income capitalized at six per cent. ($100,000), therefore, represents franchise value. If this as property be added to the capital, the company is entitled to a reasonable return on $200,000, i. e., $12,000. The result is to make a rate statute impossible. But the inference from the above excerpt seems to be that the franchise value should be computed after the passage of the act and in view of its effect. This leads to similar anomalous results. If the value of the franchise depends on the earnings, then so far as the rate statute diminishes these it diminishes the value of the franchise, and, as the regulation might be carried to a point where the earnings would be reduced

[16]Smyth *v.* Ames (1897) 169 U. S. 466, 545.
[17]For facts in detail, see p. 186, *post*.
[18]See 8 Columbia Law Review 143.
[19]Consol. Gas Co. *v.* City of N. Y. (1907) 157 Fed. 849, 879.

to a fair return on the investment only, the franchise might be deprived of all value. If this be the position of the Court, it practically amounts to a repudiation of the notion that a franchise is property at all, or, at least, is to be considered in rate regulation. It is to be noted in this connection, that in another case[20] involving a rate statute, decided on the same day, no allowance for franchise value was included in the appraisement of the company's property.

THE THEORY OF THE JUDICIAL DECISION AS INFLUENCED BY THE EFFECT OF AN OVERRULING DECISION.—Blackstone, maintaining that judges do not make, but simply find the law, asserted that a decision never creates a new rule of law but merely embodies a rule or custom which always existed.[1] A resulting corollary of this theory is that a decision is not the law, but merely evidence of it, and an overruling decision does not abrogate or change the law of the overruled, but authoritatively asserts that it never existed. It necessarily follows that an overruling decision, unlike a repealing statute, must have a retrospective operation. Austin and later writers, instancing examples of judicial legislation, vigorously criticized Blackstone's theory as artificial and fictitious.[2] Although Jessel, M. R., admitted that the equity judges had from time to time invented the rules of equity,[3] the common law judges have steadfastly reiterated the Blackstone theory.[4] But its consequence, that an overruling decision must operate retrospectively, by reason of hardship and mischief in the impairment of contract and property rights acquired in reliance on the earlier decision, has had these results: (1) it has furnished compelling reason for adherence to the doctrine of *stare decisis*;[5] (2) it has led courts when constrained to overrule their decisions, while professing allegiance to the orthodox Blackstone theory, to depart widely from a logical acceptance of it.

Equity courts have, under some circumstances, refused to give common law decisions retrospective effect; for example, it has been held that an overruling decision shall not retroact so as to reopen settlements made in reliance on the decision at the time of the settlements.[6] Perhaps the earliest evidence of the refusal of courts in general to accept unqualifiedly the orthodox theory is the long established rule that the rights of *bona fide* purchasers at a judicial sale shall not be affected by the retrospective operation of the reversal on appeal or writ of error of the equitable decree or legal judgment under which they purchased.[7] Some courts confine the exception to cases of judicial sales,[8] others extend it to the case of a purchaser from a successful party to the first hearing before the citation of the writ of error, as distinguished from the appeal.[9] On the authority of

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[20] Mayor *et al.* *v.* Knoxville Water Co. (1909) Supr. Ct., Oct. Term, 1908, No. 17. See also, opinion of Hough, J., in Consol. Gas Co. *v.* City of N. Y. (1907), 157 Fed. 849, 872 *et seq.*

[1] 1 Bl. Com. 70.

[2] Austin, Jurisprudence 778; Salmond, Theory of Judicial Precedents, 16 L. Quart. Rev. 376; Thayer, Judicial Legislation, 5 Harv. L. Rev. 172.

[3] In re Hallett's Estate (1879) 13 Ch. Div. 676, 710.

[4] Norway Plain Co. *v.* Boston & Me. R. R. (1854) 1 Gray 263, 267.

[5] Sharswood, J., in Ram, Legal Judgments 423.

[6] Lyon *v.* Richmond (1816) 2 Johns. Ch. 51.

[7] Voorhees *v.* Bk. of U. S. (1836) 10 Pet. 449, 475.

[8] Harle *v.* Langdon's Heirs (1883) 60 Tex. 555; Delano *v.* Wilde (1858) 11 Gray 17.

[9] Lessee of Taylor *v.* Boyd (1828) 3 Ohio 337; Macklin *v.* Allenburg (1889) 100 Mo. 337.